STATE OF MICHIGAN

COURT OF APPEALS

LAURIE L. TINNIN,

Plaintiff-Appellant,

v

CITY OF BURTON,

Defendant-Appellee.

UNPUBLISHED
July 19, 2005

No. 258244
Genesee Circuit Court
LC No. 03-075820-CZ

Before: Neff, P.J., Smolenski and Talbot, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's order dismissing her Freedom of Information Act (FOIA), MCL 15.231 *et .seq*., claim. We reverse.

Plaintiff first argues that the trial court failed to consider defendant's admissions and erred when it found that defendant did not violate the FOIA.[1] We agree. This Court reviews a trial court's factual findings for clear error. *Meredith Corp v City of Flint*, 256 Mich App 703, 711-712; 671 NW2d 101 (2003). A finding is clearly erroneous when, upon reviewing the entire record, this Court is left with a definite and firm conviction that a mistake was made. *Westlake Transportation, Inc v Public Service Commission*, 255 Mich App 589, 611; 662 NW2d 784 (2003).

Under MCR 2.312(B)(1), a party has twenty-eight days after service of a request for admissions to provide written answers or objections to the party requesting the admissions. If the party to whom the request is directed fails to timely answer the request for admissions, "[e]ach matter as to which a request is made is deemed admitted . . . ." MCR 2.312(B)(1). "A matter admitted under this rule is conclusively established unless the court on motion permits withdrawal or amendment of an admission." MCR 2.312(D)(1). Admissions under MCR 2.312 are "judicial" admissions, which "are not really 'evidence' at all." *Radtke v Miller, Canfield, Paddock & Stone*, 453 Mich 413, 420-421; 551 NW2d 698 (1996). The import of the judicial

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[1] We note that plaintiff does not argue on appeal that defendant withheld any of the requested records.

admission is that it is conclusively established in the case and is not subject to contradiction or explanation. *Id.* at 421.

Here, defendant did not timely respond to the requests for admission and did not file a motion to amend or withdraw the admissions. Therefore, the circuit court correctly ordered that plaintiff's requests for admissions be deemed admitted. Defendant's admissions conclusively established: (1) on February 4, 2003, defendant received a written FOIA request from plaintiff; (2) on February 24, 2003, defendant requested a second ten-day extension to respond to plaintiff's request; (3) plaintiff did not "otherwise agree in writing" that defendant be allowed to respond to the February 4, 2003, FOIA request in a manner not provided by the FOIA; and (4) the $985 estimate was based on the $28.15 hourly pay rate of defendant's purchasing agent, and the court ordered defendant to charge plaintiff not more than $15 per hour.

The FOIA requires a public body to provide the public with access to all government information that is not specifically exempt from disclosure. *Meredith Corp, supra* at 712. Unless otherwise agreed to in writing, a public body must respond to a request for public records within five business days of receipt of the request by either granting the request in whole or in part, denying the request in whole or in part, or notifying the requesting party that it will respond to the request in ten business days. MCL 15.235(2)(a)-(d); *Key v Paw Paw Twp*, 254 Mich App 508, 511-514; 657 NW2d 546 (2002). Failure to timely respond to a request constitutes a final determination to deny the request. *Scharret v City of Berkley*, 249 Mich App 405, 412; 642 NW2d 685 (2002).

Defendant's admissions conclusively demonstrate that defendant violated the FOIA by responding late and by issuing a second ten-day extension. Because plaintiff's FOIA request was filed on Tuesday, February 4, 2003, the deadline for defendant's response expired on Tuesday, February 11, 2003. The admissions also conclusively established that plaintiff had not otherwise agreed in writing to alter the time for response. Therefore, defendant's response on Wednesday, February 12, 2003, was untimely. MCL 15.235(2). In addition, defendant's February 24, 2003, request for a second ten-day extension violated the FOIA's provision that a public body may issue a notice "extending for not more that 10 business days" the deadline for responding. MCL 15.235(2)(d). The trial court's finding that defendant did not violate the FOIA was clearly erroneous because the trial court improperly considered evidence in its findings of fact that contradicted the admissions.

Plaintiff also argues that these admissions conclusively established that defendant charged an excess fee for the records. We disagree. MCL 15.234(3) provides:

> In calculating the cost of labor incurred in duplication and mailing and the cost of examination, review, separation, and deletion under subsection (1), a public body may not charge more than the hourly wage of the lowest paid public body employee capable of retrieving the information necessary to comply with a request under this act. . . . A public body shall utilize the most economical means available for making copies of public records. A fee shall not be charged for the cost of search, examination, review, and the deletion and separation of exempt from nonexempt information as provided in section 14 unless failure to charge a fee would result in unreasonably high costs to the public body because of the

> nature of the request in the particular instance, and the public body specifically identifies the nature of these unreasonably high costs. . . .

The admissions established that the trial court ordered defendant to charge plaintiff not more that $15 per hour, which was less than defendant originally estimated. The admissions, however, failed to establish that the purchasing agent was the "lowest paid public body employee capable of retrieving the information" or that defendant failed to use the most economical means to make the copies. The trial court did not err when found that defendant did not charge an excessive fee because the nature of plaintiff's request changed after she filed it. Her February 4, 2003, request was for copies of all the material with detailed attachments. She later requested inspection of the records to determine which documents she wanted copied.

Plaintiff next argues that the trial court incorrectly determined that plaintiff had waived her right to file the action until after March 7, 2003. Michigan courts define "waiver" as the voluntary and intentional relinquishment of a known right. *Moore v. Moore*, 266 Mich App 96, 103; ___ NW2d ___ (2005). We agree that plaintiff waived her right to file the suit until after March 7, 2003, because she told defendant that, although it had violated the FOIA, she would give defendant until March 7, 2003, to fulfill her FOIA request. Nonetheless, the trial court erred when it relied on plaintiff's waiver because defendant waived its right to this defense when it did not plead it as a defense in its responsive pleadings. MCL 2.111(F)(2) provides, in pertinent part, that "[a] defense not asserted in the responsive pleading or by motion as provided in these rules is waived, except for the defenses of lack of jurisdiction over the subject matter of the action, and failure to state a claim on which relief can be granted." See also, *Harris v Vernier*, 242 Mich App 306, 312; 617 NW2d 764 (2000). Defendant did not assert as a defense that plaintiff waived her right to sue until after March 7, 2003. Because this defense involves neither subject matter jurisdiction nor failure to state a claim, defendant waived it.

Lastly, plaintiff argues that she was the prevailing party in this matter. We disagree. The FOIA requires that a trial court must award reasonable attorney fees and costs to a prevailing party. MCL 15.240(6). "A party prevails in the context of a FOIA action when the action was reasonably necessary to compel the disclosure, and the action had a substantial causative effect on the delivery of the information to the plaintiff." *Scharret, supra* at 414. A trial court, however, "may, in its discretion, award all or an appropriate portion of reasonable attorneys' fees, costs, and disbursements" to a party that prevails in part. MCL 15.240(6).

Here, plaintiff's lawsuit was not reasonably necessary to compel the disclosure of the information sought. Although defendant did not timely respond to plaintiff's request and asked for a second ten-day extension, defendant's tardy FOIA response indicated that plaintiff could obtain the information copies of the information after paying the estimated fee. Gail Webster's affidavit showed that defendant commenced a search for the records and began copying them soon after plaintiff paid the $492.50 deposit. Moreover, after plaintiff modified her request by demanding that defendant allow her to inspect the records, defendant asked plaintiff to set up a time to come in for inspection. Therefore, plaintiff's suit did not compel disclosure. Plaintiff was not the prevailing party within the context of the FOIA.

Plaintiff emphasizes that defendant did not invite her to inspect the records until after the lawsuit was filed and she demanded access. In plaintiff's FOIA request, however, plaintiff clearly asked for copies of the requested records. She did not ask to inspect the records until

March 28, 2003. Nothing in the FOIA requires a public body to offer a requesting party the opportunity to inspect records when the party requested copies. See MCL 15.235. Plaintiff also argues that because she received records and opportunity to inspect after she filed suit, the suit substantially caused the disclosure. The fact that defendant clearly indicated that it was willing to provide the records before plaintiff filed suit, but needed time to retrieve and sort the files, belies plaintiff's argument on this point. Thus, it is clear that plaintiff did not fully prevail in her FOIA claim. *Scharret*, *supra* at 414.

Plaintiff did, however, prevail in part. Defendant's judicial admissions conclusively established two distinct FOIA violations, and plaintiff was, therefore, entitled to summary disposition on those claims. Although an award of costs and attorneys' fees to a party that only partially prevails under the FOIA is discretionary, the trial court based its determination on the erroneous finding that defendant had not violated the FOIA. The trial court, therefore, held that plaintiff "can seek no costs or attorney's fees." Because the trial court failed to consider whether plaintiff was entitled to costs and attorneys' fees as a partially prevailing party, it abused its discretion, and the cause should be remanded for reconsideration on this issue.

Reversed and remanded for further proceedings not inconsistent with this opinion. We do not retain jurisdiction.

/s/ Janet T. Neff
/s/ Michael R. Smolenski
/s/ Michael J. Talbot